(1) 88-1450

Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1989

**DURA-CORP, a Pennsylvania Business Corporation,**

**Petitioner**

**vs.**

**RISI STONE LTD., A Canadian Corporation and ROTHBURY INVESTMENTS, LTD., a Canadian Corporation,**

**Respondents**

**ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

# PETITION FOR WRIT OF CERTIORARI

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Dated: February 28, 1989

46 pp

## A. QUESTION PRESENTED FOR REVIEW

1. Whether the District Court Order issued in this case unconstitutionally violates an international treaty because it granted a mandatory stay under §3 of the Federal Arbitration Act in an ongoing case arising under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

2. In the alternative, whether the Third Circuit lacked appellate jurisdiction in this case under its recent pronouncement in the case of Zosky v.Boyer 856 F.2d 554 (3rd Cir. 1988) and this Court's recent pronouncement in the case of Gulf Stream Aerospace Corp. vs. Mayacamas Corp., ____ U.S. _____, 108 S. Ct. 1133 (1988).

3. Whether the District Court was constitutionally obliged to weigh the jurisdictional contacts of the parties to determine the appropriate forum for arbitration.

## B. LIST OF PARTIES AND RULE 28:1 LIST

PETITIONER: (1) DURA-CORP, a Pennsylvania Business Corporation. There are no parent companies, subsidiaries or affiliates of Petitioner.

RESPONDENTS: (1) RISI STONE LIMITED, a Canadian Corporation

(2) ROTHBURY INVESTMENTS, LIMITED, a Canadian Corporation. Petitioner obtained its patent license from Risi Stone, Ltd., which subsequently transferred its patent rights to Rothbury Investments, Ltd. Risi Stone and Rothbury Investments, Ltd. are controlled by the same individuals, to-wit: Angelo and Antonio Risi.

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2. Judgment Order, United States Court of Appeals for the Third Circuit, December 19, 1988. Appendix pages a-1 through a-2.

3. Order denying F.R.C.P. 60(b) Motion to Open Order, United States District Court for the Western District of Pennsylvania, August 1, 1988. Appendix pages a-42 through a-43.

F. STATEMENT OF JURISDICTION

Petitioner is seeking review of a Judgment Order issued by the United States Court of Appeals for the Third Circuit

on December 19, 1988, which Order summarily affirmed the Opinion and Order of the United States District Court for the Western District of Pennsylvania rendered on July 1, 1988. A Petition for Rehearing was timely filed by Petitioner and subsequently denied by the Third Circuit. Jurisdiction in the Third Circuit in Case No. 88-3519 was based on 28 U.S.C. §1292(a)(1) and §1291. In Case No. 88-3546, jurisdiction was based solely on 28 U.S.C. §1291.

Petitioner has not requested any extension of time within which to file the instant Writ of Certiorari. The statutory provision believed to confer jurisdiction on this Court to review the aforementioned Judgment Order is 28 U.S.C. §1254(1). This Petition is timely filed under F.R.A.P. 41(a), (b); Supreme Court Rule 20.2 and 28 U.S.C., §2101(d).

G. VERBATIM REPRODUCTION OF CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

1. USCS CONVENTIONS, CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, ART. I., ET SEQ.

(i) * * * Article II (3): "3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, in-operative or incapable of being performed."

2. CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS (9 U.S.C. §201, ET SEQ.)

(i) 9 U.S.C. § 202: "Agreement or award falling under the Convention. An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in §2 of this title (9 U.S.C.S. §2), falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States. (Added July 31, 1970, P.L. 91-368 §1, 84 Stat. 692)."

(ii) 9 U.S.C. §203: "Jurisdiction; amount in controversy. An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in §460 of title 28 (28 U.S.C.S. §460) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy. (Added July 31, 1970, P.L. 91-368, §1 84 Stat. 692)."

(iii) 9 U.S.C. §206: "Order to compel arbitration; appointment of arbitrators. A court having jurisdiction under this chapter (9 U.S.C.S. §§201, et seq.) may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement. (Added July 31, 1970, P.L. 91-368, §1, 84 Stat. 692)."

(iv) 9 U.S.C. §208: "Chapter 1 (9 U.S.C.S. §§1 et seq); residual application. Chapter 1 (9 U.S.C.S. §§1 et seq.) applies to actions and proceedings brought under this chapter (9 U.S.C.S. §§201 et seq.) to the extent that chapter is not in conflict with this chapter (9 U.S.C.S. §§201 et seq.) or the Convention as ratified by the United States. (Added July 31, 1970, P.L. 91-368, §1, 84 Stat. 692)."

2. FEDERAL ARBITRATION ACT (9 U.S.C.S. §1 ET SEQ.)

(i) 9 U.S.C. §3: "Stay of proceedings where issue therin referable to arbitration. If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitra-

tion under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (July 30, 1947, ch 392 §1, 61 Stat. 670)."

(ii) 9 U.S.C., §4: " Failure to arbitrate under agreement; petition to United States court for order to compel arbitration; notice and service thereof; hearing and determination. A party aggreived by the alleged failure, neglect or refusal of another arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 (28 U.S.C.S. §§1 et seq.), in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure (U.S.C.S. Rules of Civil Procedure). The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing

such arbitration is filed. If the making of the arbitration agreement or the failure, neglect or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure (U.S.C.S. Rules of Civil Procedure), or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directly the parties to proceed with the arbitration in accordance with the terms thereof. (July 30, 1947, ch 392, §1, 61 Stat. 671; Sept 3, 1954, ch 1263, §19 68 Stat. 1233.)."

3. CONSTITUTION PROVISIONS

(i) Article VI, Cl. 2: "Supreme law. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

(ii) United States Constitutional Amendment XIV:" Section 1. Citizens of the United States. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. JURISDICTIONAL PROVISIONS

(i) 28 U.S.C. §1291: "Final decisions of district courts. The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title (28 U.S.C.S. §§1292(c), (d), 1295). (June 25, 1948, ch 646, §1, 62 Stat. 929; Oct. 31, 1951, ch 655 §48, 65 Stat. 726; July 7, 1958, P.L. 85-508, §12(e), 72 Stat. 348; Apr. 2, 1982, P.L 97-164, Title I, Part A, §124, 96 Stat. 36). "

(ii) 28 U.S.C. §1292(a)(1): " Interlocutory decisions. (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory

orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court."

5. VENUE PROVISIONS

(i) 28 U.S.C. §1404(a): "Change of venue. (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

## H. STATEMENT OF THE CASE

Rothbury Investments, Ltd. (hereinafter sometimes referred to as "Rothbury"), is a Canadian corporation which owns certain United States patents and trademarks pertaining to a concrete retaining wall system (304a., para. 8)[1] . These patents and trademarks were originally applied for by a related corporation, Risi Stone, Ltd., which subsequently assigned its intellectual property rights to Rothbury (306a., para. 13). Both Rothbury and Risi Stone, Ltd. are controlled and managed by Angelo and Anthony Risi, who are Canadian citizens.

Sometime in 1983, while applications for the aforesaid patents and trademarks were still pending in the United States, Mssrs. Risi began to explore the commercial exploitation of their retaining wall invention in the United States. Mr. Eddy, a

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[1] All citations are to the record in the United States Court of Appeals for the Third Circuit.

local attorney and businessman, was ultimately chosen by the Risis as a business partner for the enfranchisement of their invention in the U.S.

In November of 1983, the Risis, Eddy and Dehus entered into an agreement with Risi Stone, Ltd., whereby they obtained an exclusive patent license for the manufacture and distribution of products embodying the Risi invention in a four-state territory comprised of Pennsylvania, Ohio, West Virginia and Maryland. (the "License Agreement", 311a.-330a.). Shortly thereafter, in January of 1984, these same individuals entered into another agreement with Rothbury (77a.), (the "Franchising Agreement") which agreement granted to the aforesaid individuals the right to form a corporation or other legal entity to act as Defendant's exclusive agent for purposes of establishing additional "franchises" throughout the remainder of the United States.

In October of 1984, the Risis, Eddy and Dehus formed Dura-Corp, a Pennsylvania corporation, to which they assigned their rights under the License Agreement (305a., para. 12). Shortly thereafter, Dura Systems, Inc., (hereinafter sometimes referred to as "Dura Systems"), also a Pennsylvania corporation, was formed for the purpose of acting as Rothbury's U.S. franchising agent under the terms of the Franchising Agreement (70a., para. 10).

U.S. patents for the Risi invention were obtained in December, 1984, through the joint efforts of Risi and Eddy (121a.). During the following 18 months, in reliance on Dura-Corp's right to make all Risi products embodying the invention, and solely with the use of capital supplied by Eddy, Dura-Corp constructed a state-of-the-art manufacturing facility in New Stanton, Pennsylvania which was to serve, inter alia, as the prototype manufacturing facility for

Dura Systems' U.S. franchising effort (120a., 186a., para. 5). In connection therewith, Dura-Corp equipped the new facility with many expensive "extras" designed to enhance the attractiveness of the operation to prospective franchisees (120a., 125a.). Contemporaneously with the construction of the manufacturing plant, Dura-Corp and Dura Systems developed an extensive marketing program for the manufactured products, which was also intended to serve as a prototype for Dura Systems in its procurement of additional U.S. franchisees (126a., 186a.). Although the New Stanton facility has the present capability to manufacture, distribute and sell all Risi products, the Respondent Risi has denied Dura-Corp the right to do so under the License Agreement.

The License Agreement was a "form agreement" drafted for use in Canada by and between Respondent and its Canadian franchisees. It was brought to the United

States by Angelo Risi for execution as a preliminary agreement to establish Respondents' first U.S. franchise. (p. 311a., et seq; p. 345a.-346a. para. 2, 7,; Plaintiff's Brief in Opposition to Motion to Stay Proceedings and Compel Arbitration at p. 6; Plaintiff's Sur Reply Brief at p. 1-2). The License Agreement contains a compulsory arbitration provision in paragraph 28 (p. 324a.-325a.) and states in paragraph 31 that the Agreement was to be construed and governed by the laws of Ontario (p. 326a.). It does not, however, designate a forum where arbitration is to take place. On at least one occasion, Respondent Risi eschewed the foregoing arbitration provision and filed a civil action arising under the agreement against Dura-Corp in the Court of Common Pleas of Allegheny County, Pennsylvania. (Case No. 10242-1986; Plaintiff's Sur Reply Brief at p. 1-2; Plaintiff's Supplemental Brief at pp. 1-2, 5-6).

On July 29, 1986, Petitioner filed, but did not serve, a Complaint for Declaratory Judgment in the District Court seeking a determination of the scope of its patent license grant. On November 12, 1986, Petitioner filed an Amended Complaint including allegations of certain damages resulting from Respondent's alleged breach of the License Agreement. Jurisdiction in the District Court was based on 28 U.S.C. §1332(a) (diversity of citizenship). Subsequently, by letter dated November 14, 1986 (Exhibit "A"; Plaintiff's Memorandum in Opposition to Rule 11 Sanctions), Respondent's Counsel agreed to accept service of process of the Amended Complaint in exchange for Petitioner's agreement to accept service of process of the aforementioned Allegheny County Common Pleas action. On December 19, 1986, Respondents filed a Motion to Stay Proceedings and Compel Arbitration in the District Court under § 3 of the FAA. The

Motion requested the District Court to compel arbitration "in accordance with the agreement."

By letter dated July 22, 1987, a copy of which was sent to the District Court, Petitioner offered to proceed to arbitrate this dispute in the Western District of Pennsylvania using the American Arbitration Association Rules. (Plaintiff's Supplemental Brief, Ex. "A"). This offer was summarily rejected by Defendants' Counsel by letter dated August 11, 1987 (Plaintiff's Supplemental Brief, Ex. "B").

On July 1, 1988, 1 year and 7 1/2 months after the filing of the Amended Complaint, an Opinion and Order was issued by the District Court granting the Motion to stay Proceedings and Compel Arbitration, and directing that arbitration take place in Ontario, Canada. This Order was appealed on August 1, 1988. (Case No. 88-3519). Also on August 1, 1988, Appellant brought a Motion

in the District Court pursuant to F.R.C.P. 60(b) to Open the July 1, 1988 Order, to Dismiss Defendants' Motion to Compel Arbi-Arbitration, and To Compel Arbitration in the Western District of Pennsylvania. This Motion was summarily denied by the District Court by Order of even date therewith[2]. This second order was appealed on August 12, 1988 (Case No. 88-3546). Thereafter, Petitioner brought a Motion to Consolidate the two appeals in the Third Circuit, which Motion was granted on September 2, 1988. These two appeals were consolidated with the Third Circuit appeal entitled Dura Systems vs. Rothbury Investments, Ltd. at Case No. 88-3520. This case is not the subject of the instant Writ. After Petitioner submitted its brief in the third Circuit,

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[2] On July 19, 1988, Respondents filed a Motion for Rule 11 Sanctions against Petitioner. This Motion was summarily denied by the District Court on December 6, 1988 on the basis that "Plaintiff's pleadings were not interposed for improper purposes." (See Appendix at p. a-44).

Respondents filed a Motion to Quash Appeals at Case Nos. 88-3519 and 88-3546 on the grounds that the Court lacked Appellate jurisdiction. The Third Circuit sustained Appellate jurisdiction and affirmed the District Court Orders.

## I. REASONS RELIED UPON FOR ALLOWANCE OF WRIT

With respect to the Appeal at Case No. 88-3519, Petitioner contends that the Third Circuit's Judgment Order summarily affirming the District Court's Order staying proceedings under §3 of the Federal Arbitration Act (9 U.S.C. §1, et seq., the "FAA"), and at the same time "compelling" arbitration in Canada, is in direct conflict with either §4 of the FAA, or Article II(3) of the International Treaty known as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (implemented at 9 U.S.C. §201, et seq.). It is also at odds

with the New York cases which have addressed identical issues.

In the alternative, the Judgment Order is in direct conflict with the Third Circuit's recent pronouncement in the case of Zosky v. Boyer, 856 F.2d 554 (3d Cir., 1988) and this Court's recent pronouncement in the case of Gulf Stream Aerospace Corp vs. Mayacamas Corp., _____ U.S._____, 108 S.Ct. 1133 (1988).

With respect to the Appeal at Case No. 88-3546, the Judgment Order is inconsistent with the Convention. The Judgment Order is also contrary to the decision of this Court in Gulf Oil vs. Gilbert, 330 U.S. 591, 678 S.Ct. 893 (1947) and its progeny, and the Constitutional doctrine of forum non conveniens.

Petitioner also contends that the District Court and the Third Circuit have decided this case in a manner which has so far departed from the accepted and usual

course of judicial proceedings as to warrant the exercise of this Court's power of supervision.

J. ARGUMENT

ISSUE ONE (A) THE DISTRICT COURT ORDER ISSUED IN THIS CASE UNCONSTITUTIONALLY VIOLATES AN INTERNATIONAL TREATY BECAUSE IT GRANTED A MANDATORY STAY UNDER §3 OF THE FEDERAL ARBITRATION ACT IN A CASE ARISING UNDER THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.

(B) IN THE ALTERNATIVE, THE THIRD CIRCUIT LACKED APPELLATE JURISDICTION IN THIS CASE UNDER ITS RECENT HOLDING IN THE CASE OF ZOSKY VS. BOYER AND THIS COURT'S RECENT HOLDING IN GULF STREAM AEROSPACE CORP. VS. MAYACAMAS CORP.

At the time Appeal No. 88-3519 was docketed, the Third Circuit's Appellate Jurisdiction in this case could not have been seriously questioned. With respect to the portion of the District Court Order granting Defendants' Motion to Stay Proceed-

ings, (para. 1, a-3) jurisdiction was based on 28 U.S.C. §1292(a)(1). This section allowed appeals from interlocutory orders of the District Court granting or denying injunctions. With respect to the portion of the District Court Order granting Defendants' Motion to Compel Arbitration, jurisdiction was based on 28 U.S.C. §1291. This section allowed appeals from final orders of the District Court. Gavlik Construction Company vs. H.F. Cambell Company, 526 F.2d 777 (3rd Cir. 1975).

Subsequent to the docketing of this Appeal, the Third Circuit handed down its opinion in the case of Zosky vs. Boyer, 856 F.2d 554, No. 87-1782 (3rd Cir. 9/8/88). Zosky corrected a conceptual error which had been made by the Court in Gavlik, supra, and which error was followed by its progeny, id at 12-13. The Third Circuit also recognized the repeal of the Enclow-Ettleson doctrine

in Gulf Stream Aerospace Corporation vs. Mayacamas Corporation, U.S.___, 108 S.Ct. 1133 (1988), which doctrine was the source of appellate jurisdiction under 28 U.S.C. §1292(a)(1) in the instant case.

In Zosky, supra, the Court rejected the distinction made in Gavlik, supra, between District Court orders staying proceedings under §3 of the Federal Arbitration Act (9 U.S.C. §1, et seq.; the "FAA"), and those compelling arbitration under §4 thereof in an ongoing lawsuit. In reversing existing case law, the Court held that ongoing lawsuits are governed by §3 of the FAA and regardless of their label, "(o)rders staying proceedings or compelling arbitration in an ongoing lawsuit... are non-appealable interlocutory orders (under 28 U.S.C. §1292(a)(1))." Id. at 18. The Court further held that §4 of the FAA is the vehicle to be used to compel arbitration only where there is no pending lawsuit. (citing Rodgers vs.

Scherling Corp., 262 F.2d 180 at 182 (3rd Cir. 1959); cert. den. 359 U.S. 991.)

The effect of Zosky, and Gulf Stream, in cases arising under the FAA, is clear. §3 was intended by Congress to provide the remedy in the form of a mandatory stay of the action for a litigant opposed to the filing and prosecution of a lawsuit in a district or state court when there is an issue as to whether the controversy is governed by an arbitration clause. Such stay orders are now interlocutory and non-appealable under 28 U.S.C. §1292(a)(1). (Gulf Stream, supra). §4 of the FAA, on the other hand, was intended by Congress to provide a remedy to "a party aggrieved by the alleged failure, neglect or refusal of another to arbitrate under a written agreement for arbitration..." and allows such a party to "(b)ring an action whose sole purpose is to compel arbitration." (emphasis added). §4 expressly excludes its

application to an ongoing lawsuit. Under §4 a District Court is expressly limited to compelling arbitration in its own district, and an order issued thereunder is final and appealable.

As aptly noted by the Court in Zosky, "a §4 motion to compel has often been filed in an ongoing proceeding (citation omitted) thereby blurring the distinction between orders under §3 staying ongoing proceedings and orders in independent proceedings to compel arbitration under §4." Id. at 5-6. Indeed, in an ongoing proceeding, a §3 mandatory stay order is "(c)learly the remedy intended for a Defendant who wants to compel the Plaintiff to Arbitration.' Id. at 6. (citing Metropolitan World Tanker Corp. vs. P.N. Pentambangan Minjakdan Gas Bomi Nasional, 427 F.Supp 2, 4 (S.D.N.Y., 1975); The Anaconda vs. American Sugar Refining Co., 322 U.S. 42 at 45 (1944); Hartford Financial Systems, Inc. vs. Florida

Software Services, Inc., 712 F.2d 724 at 728-729 (1st Cir, 1983).

In summary, in an ongoing case arising under the FAA, the District Court can only issue a mandatory stay order under § 3 thereof. Such orders are now interlocutory and non-appealable. (Zosky, supra.) On the other hand, § 4 court orders should arise only in independent proceedings, the sole purpose of which is to compel arbitration in the district in which the motion to compel is brought. Id. Only orders issued under §4 are final under §1291.

Both Zosky, supra, and Gulf Stream, supra, represent a correct analysis of the law, but only with respect to those arbitration orders arising under the FAA. The instant case, however, is not controlled by the FAA. It arises under and is controlled by the Convention because it involves a controversy between citizens of different countries (9 U.S.C.

§202, 203)[3].

Unaddressed in Zosky, supra, and Gulf Stream, supra, was the critical issue of whether a mandatory stay order issued under §3 of the FAA can be applied in an ongoing

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[3] The Convention is an International Treaty which exclusively governs arbitration of disputes between citizens of different countries where jurisdiction over the parties lies in the United States. (9 U.S.C. §§202, 203). 9 U.S.C. §206 is the only possible source of the District Court's authority to compel arbitration of this case in Ontario, Canada. 9 U.S.C. §206 grants a district court the discretion to "direct that arbitration be held in accordance with the agreement at any place therein provided for..." In the case at bar, the District Court found Ontario, Canada to be "impliedly" selected by the parties, even though the arbitration clause was silent as to an arbitration forum.

case arising under the Convention[4] . Petitioner has consistently maintained that such a §3 stay order was not appropriate in this case because this case arises under the Convention (Brief in Opposition to Motion to Quash Appeals, p. 2-9). Under §3 of the FAA, the District Court is required to stay proceedings pending before it, thereby retaining jurisdiction in the case. Under the Convention, the Court is required to divest itself of jurisdiction in the case.

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[4] §208 of the Convention provides that the FAA applies to actions or proceedings arising under the Convention to the extent that the FAA is not in conflict therewith. This is in accord with the Supremacy Clause of the United States Constitution (U.S. Const. Art. VI, Cl.2) Mitsubishi Motors Corp. vs. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346 (1985) cited by the District Court supports Petitioner's arguments in the case at bar. In Mitsubishi, this Court held that an order granting an "offensive" §4 Motion to Compel Arbitration is appropriate in a case arising under the Convention because such an order is not "inconsistent" with §208 of the Convention. The issue in the case at bar is whether an Order granting a defensive §3 Motion to Stay Procedings is inconsistent with § 208 of the Convention. See also Builders Fed. (Hong Kong) Ltd., vs. Turner Const. 655 F.Supp 1400 (S.D.N.Y. 1987).

(9 U.S.C. §206; Convention, Article II (3)). This conflict between §3 of the FAA and Article II(3) of the the Convention in ongoing cases must be resolved in favor of the Convention (9 U.S.C. §208). It is patently inconsistent under §208 and thus impermissable to issue a FAA §3 mandatory stay order in connection with an order compelling arbitration in Canada in a case arising under the Convention.

> "Unlike §3 of the (FAA), Article II(3) of the Convention provides that the Court of a contracting state shall 'refer the parties to arbitration' rather than 'stay the trial of the action.' The Convention forbids the Courts of a contracting state from entertaining a suit which violates an agreement to arbitrate." McCreary Tire and Rubber Co. vs. CEAT, 501 F.2d 1032, 1038 (3rd Cir., 1974).

The paradoxical nature of the District Court Order in the instant case was also contained in an Order in Siderius, Inc. v.

Compania de Acero del Pacifico, 453 F.Supp 22 at 25 (S.D.N.Y. 1978) and was addressed by the Court as follows:

> "The Convention requires recognition of arbitration agreements and referral of the parties to the forum which they have selected for resolution of their dispute. Once this has been done, neither the Convention nor the (FAA) provides for further judicial involvement until a party specifically seeks recognition of an award. This is in contrast to §3 of the (FAA), 9 U.S.C., §3, which does not require referral, but specifically requires a 'stay (of) the trial of the action until such arbitration has been had in accordance with the terms of the agreement.' The finality of the referral procedure, and the absence of any provision for the retention of jurisdiction after referral by the Court, indicates that dismissal of the complaint for lack of subject matter jurisdiction is the appropriate remedy under the Convention."

In the instant case, the Third Circuit summarily affirmed the District

Court's granting of a §3 FAA stay order in a case arising under the Convention. In so doing, the Third Circuit sustained Appellate jurisdiction[5], thereby distinguishing this case from Zosky, supra, which held that District Court orders under §3 of the FAA are interlocutory and non-appealable.

Petitioner submits that the Third Circuit was compelled to hold that the case at bar is either controlled (1) by §3 of the FAA, in which event the District Court, properly having jurisdiction, could only have issued an Order staying the proceedings which would have been interlocutory and non-appealable under Zosky, supra, and Gulf Stream, supra or (2) by Article II(3) of the Convention, (and 9 U.S.C. §206) in which event the District Court Order is in direct violation of an international treaty, and is final and

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[5] This Court neither granted nor denied Appellee's Motion to Quash Appeals, which Motion was predicated on a lack of Appellate jurisdiction under Zosky, supra.

immediately appealable[6] .

The District Court's hybrid order which grants a § 3 stay order and at the same time compels arbitration outside its district is paradoxical and "inconsistent" with both § 4 of the FAA and the Convention within the meaning of §208. It should have been vacated, (Builders Fed. (Hong Kong) Ltd., supra.) or at a minimum, remanded for further analysis. In addition, Petitioner contends that the District Court was constitutionally obliged to weigh the jurisdictional contacts of the parties to determine the appropriate forum for arbitration which it twice refused to do.

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[6] Alternatively, this case is controlled by § 4 of the FAA because no forum was designated in the Agreement. Where no forum is "provided for" in an international arbitration agreement arising under the Convention, a District Court is limited to referring arbitration in its own district under 9 U.S.C. §4. Oil Basin, Ltd., vs. Broken Hill Proprietary Co., 613 F.Supp 483, (D.C.N.Y. 1985). In this scenario, the FAA is not "inconsistent" with the Convention and thus unquestionably applicable under §208.

(Case Nos. 88-3519; 88-3546) The Third Circuit compounded the error of the District Court's hybrid Order by affirming a §3 stay order, and at the same time sustaining appellate jurisdiction.

Petitioner contends that, in furtherance of the strong Federal public policy favoring arbitration, the need for this Court to develop uniform case law under the Convention, and this Court's recent trend of deciding cases arising thereunder, the issues presented in this case are not only ripe, but fortuitous, and should be resolved.

ISSUE TWO: THE DISTRICT COURT WAS CONSTITUTIONALLY OBLIGED TO WEIGH THE JURISDICTIONAL CONTACTS OF THE PARTIES IN ORDER TO DETERMINE THE APPROPRIATE FORUM FOR ARBITRATION.

As previously stated, under §206 of the

Convention, the District Court has the discretion to refer the parties to an arbitration forum specified in the Agreement[7] . In the case at bar, no forum was specified in the parties' Agreement. Notwithstanding this fact, the District Court found the Canadian forum to be impliedly selected. In so doing, it refused to consider any of the parties' jurisdictional contacts. When the doctrine of forum non conveniens is invoked, the Court must look to the convenience of the parties and material witnesses, the place where events occurred, access to sources of proof and Plaintiff's choice of forum. An additional factor to be considered is

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[7] Oil Basin, supra. See also Bauhinia Corp vs. China National Machinery & Equipment, 819 F.2d 247 (9th Cir. 1987), wherein the Court held that "The District Court properly ordered Arbitration in its own district under §4 of the Federal Arbitration Act before the American Arbitration Association notwithstanding a suggestion in the Contract of a Chinese forum." See FN 6, supra.

whether the substantive law governing the dispute is that of the instant forum, or the alternative forum. Gulf Oil, supra, Oil Basin, supra[8] .

In the case at bar, nearly all factors point to the United States in general, and to the Western District of Pennsylvania in particular, as the proper forum for arbitration. These factors are amply supported by the record. (See Brief of Appellant at pp. 37-45).

The only factor which arguably supports the District Court's implied choice of the Canadian forum in the context of forum non conveniens, is paragraph 31 of the License Agreement. This paragraph designates the laws of Ontario as the substantive laws

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[8] It should be noted that "the law of New York as to the discretion of a court to apply the doctrine of forum non conveniens, and as to the standards that guide (this) discretion is....the same as the Federal Rule." Id. at 843.

governing the underlying dispute[9] . A choice of law provision, however, should only be honored by the courts where "(T)he parties have sufficient contacts with the chosen state." Jaskey Finance and Leasing vs. Display Data Corp., 564 F. Supp 160 (E.D.Pa., 1983). In the case at bar, such contacts with Ontario simply do not exist, and both the District Court and the Third Circuit either refused or neglected to engage in any analysis of the jurisdictional contacts of the parties.

The decision in the case of Lafayette Coal Company vs. Gilman, 640 F.Supp. 1 (N.D.Ill., 1986) which was ostensibly relied upon by the District Court is inapplicable

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[9] The District Court held that this case arises under Federal Patent Law, thus any consideration of the laws of Ontario should have been inappropriate.

to the instant case[10] . In Lafayette, the parties' agreement contained a choice-of-law provision designating Georgian law. The case was decided on a Motion to Transfer brought by Defendant pursuant to 28 U.S.C. §1404(a), which law applies only to the transfer of cases from one District Court to another, where venue is properly laid in both districts. It was not decided under the doctrine of forum non conveniens, as the subject case must be. However, the agreement in the Lafayette case contemplated the delivery of coal to the Defendant's Georgia plant, and the only nexus with the Illinois forum was the Plaintiffs residence. This obviously played a significant role in the Court's determination to transfer the case

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[10] Petitioner's Motion to Open the District Court Order pursuant to F.R.C.P. 60(b) was summarily denied. Petitioner did, however, raise the same issues that are being raised herein in its responses to Appellee's §3 stay motion. With the exception of its citation to Lafayette, supra, the District Court's opinion is devoid of any jurisdictional analysis.

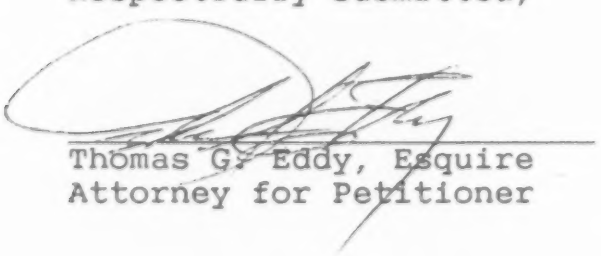
to the Southern District of Georgia. If the rule of the Lafayette case is applicable to this case, it supports the argument made by Petitioner. It does not support the analysis made by the District Court. In Lafayette, the only nexus with the Illinois forum was the Plaintiff's residence. In the case at bar, the only nexus with the Canadian forum was the Risis' residence.

> "It is often said that the Plaintiff may not, by choice of an inconvenient forum 'vex', 'harass' or 'oppress' the Defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the Defendant, the Plaintiff's choice of forum should rarely be disturbed". Gulf Oil, supra at 843.

Under the facts of this case, the Petitioner had every reason to believe that disputes arising under the License Agreement would be resolved in the United States. Conversely, by embarking upon a national

United States franchising effort, the Respondents could not have reasonably expected that disputes arising under the License Agreement would be resolved in Canada. It cannot be said that Appellant's choice of forum was inconvenient, or that it was chosen with the intent of vexing, harassing or oppressing the Appellee. To the contrary, Appellant's choice of forum is not only convenient, but it is the only rational and logical situs for resolution of the parties' disputes. The District Court should have, in its discretion, as constrained by principles of due process, ordered arbitration to take place in the Western District of Pennsylvania.

Respectfully submitted,



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